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Datasheet for the decision of 19 December 2007

Case Number: T 0753/06 - 3.2.01

Application Number: 97301305.5

Publication Number: 0792794

IPC: B62K 23/04

Language of the proceedings: EN

Title of invention:
Uniaxial bicycle control unit

Patentee:
SHIMANO INC.

Opponent:
SRAM Deutschland GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)
RPBA Art. 13(1)

Relevant legal provisions (EPC 1973):
EPC Art. 54(1), 56

Keyword:
"Novelty (no) - technical features - main and 2nd auxiliary requests"
"Late submitted material - document admitted (yes)"
"Inventive step (no) - 4th auxiliary request"
"Amendments - added subject-matter (yes) - 1st, 3rd and 5th auxiliary requests"

Decisions cited:
G 0002/88

Catchword: -

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0753/06 - 3.2.01

D E C I S I O N
of the Technical Board of Appeal 3.2.01
of 19 December 2007

Appellant: (Opponent)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 24 April 2006 rejecting the opposition filed against European patent No. 0792794 pursuant to Article 102(2) EPC 1973.

Composition of the Board:

Chairman: S. Crane
Members: J. Osborne
T. Karamanli

Summary of Facts and Submissions

I. The appeal is directed against the decision posted 24 April 2006 rejecting the opposition against European patent No. 0 792 794.

II. In its decision the opposition division took account of *inter alia* the following state of the art which played a role also during the appeal proceedings:

D1: DE-C-645 139

D6: DE-A-44 42 630.

With a letter filed 19 July 2007 the appellant (opponent) introduced the following additional state of the art:

D10: DE-B-1 186 766.

III. On 4 September 2007 the board summoned the parties to oral proceedings and indicated its provisional opinion that D10 was highly relevant and should be admitted into the proceedings. With a letter dated 16 November 2007 the respondent argued *inter alia* that D10 should be disregarded.

IV. At oral proceedings held on 19 December 2007 the appellant requested that the decision under appeal be set aside and the patent revoked. The respondent (patent proprietor) requested that the appeal be dismissed (main request) or in the alternative that the patent be maintained in amended form on the basis of first, second or third auxiliary requests filed with

the letter of 16 November 2007, a fourth auxiliary request filed during the oral proceedings or a fifth auxiliary request filed with the letter of 16 November 2007.

V. Claim 1 according to the respondent's main request (as granted) reads:

"A uniaxial composite bicycle control unit for mounting about a longitudinal axis (X) at one end of a handlebar (1) of a bicycle, the control unit comprising:
a first rotary control body (3) for attachment to a first control cable; and
a secondary rotary control body (5) for attachment to a second control cable; wherein
the first rotary control body (3) and the second rotary control body (5) rotate about the axis (X) and the first rotary control body (3) is disposed adjacent to the second rotary control body (5);
the first rotary control body (3) comprises a first annular member having a first diameter and is elongated for forming a handle grip;
characterised in that:
the second rotary control body (5) comprises a second annular member having a second diameter greater than the first diameter."

The respective claims 1 according to the auxiliary requests differ from the main request by the addition and [deletion] of features as follows:

First auxiliary request -

"characterised in that:
the second rotary control body (5) comprises a second annular member having a cylindrical body, the cylindrical body having a second diameter greater than the first diameter."

Second auxiliary request -

" … the first rotary control body (3) comprises a first elongated annular member having a first outside diameter and [is elongated for] forming a handle grip;
characterised in that:
the second rotary control body (5) comprises a second annular member having a second outside diameter greater than the first outside diameter and forming a body operable by a thumb and forefinger of an operator's hand while the remaining fingers of the operator's hand hold the handle grip."

Third auxiliary request -

" … the first rotary control body (3) comprises a first elongated annular member having a first maximum outside diameter and [is elongated for] forming a handle grip;
characterised in that:
the second rotary control body (5) comprises a second annular member having a second maximum outside diameter greater than the first maximum outside diameter and forming a body operable by a thumb and forefinger of an operator's hand while the remaining fingers of the operator's hand hold the handle grip."

Fourth auxiliary request -

" … the second rotary control body (5) comprises a second annular member having a second diameter greater than the first diameter, and
one of the first rotary control body (3) and the second rotary control body (5) is connected to a shifting cable, and the other one of the first rotary control body (3) and the second rotary control body (5) is connected to a brake cable."

Fifth auxiliary request -

" … the second rotary control body (5) comprises a second annular member having a second diameter greater than the first diameter, thus allowing simultaneous operation of the first rotary control body (3) and the second rotary control body (5), and:
the first rotary control body (3) is connected to a shifting cable, and the second rotary control body (5) is connected to a brake cable."

VI. The appellant's submissions may be summarised as follows:

It is not known why D10 was not found at an earlier stage in the proceedings. Nevertheless, it is more relevant than D1 in as far as it clearly discloses a second control body of larger diameter than a first.

As regards novelty, the designation of a 'bicycle' control unit merely implies its suitability for a bicycle. Moreover, although brake operation and gear shifting imply particular functional requirements these

do not form part of the patent specification. Indeed, it is stated in the description that the unit may be connected to "any type of control device". The reference in D1 to a motorcycle therefore does not play a role. The feature in present claim 1 of "a diameter" does not relate to any particular diameter and can only be understood as meaning the effective diameter at which effort is applied. Although D1 might not clearly disclose whether the hatched sections visible at the base of the lugs represent a diameter, the effective diameter at which effort is applied to the second control body is determined by the lugs themselves; that diameter is clearly greater than the corresponding diameter of the elongated grip. As regards D10 there is no disclosure that the unit is intended only for motorcycles. It is implicit, on the other hand, that it is suited for bicycles. The diameter of the second control unit is clearly larger than that of the longitudinal grip. This is particularly so when considering the effective diameter of the lug. It follows that the subject-matter of claim 1 according to the main request is not new with respect to the disclosures of each of D1 and D10.

There was no original disclosure of the additional feature of the "cylindrical" second control body in claim 1 according to the first auxiliary request. The discontinuous surface and the chamfer at one end render the surface non-cylindrical in both the general and mathematical senses.

The additional features of claim 1 according to the second auxiliary request are already disclosed in each

of D1 and D10 so that the subject-matter of the claim still is not new.

In claim 1 according to the third auxiliary request the concept of a "maximum" diameter of the first control body has been introduced. However, the application as originally filed contained no disclosure of such a feature.

There are no objections arising from the amendment according to the fourth auxiliary request. However, the subject-matter does not involve an inventive step in the light of a combination of the disclosures of E10 and E6.

The amendment according to the fifth auxiliary request finds no basis in the application as originally filed.

VII. The respondent's rebuttal was essentially as follows:

The main justification for admitting a late-filed document is greater relevance than evidence already in the file. This is not the case with D10 since, like D1, it relates to motorcycles and so is from a different technical field. Moreover, the second control body is a lug and the diameter of the associated ring is smaller than that of the elongated grip.

As regards novelty of the subject-matter of claim 1 according to the main request the designation "bicycle control unit" specifies a device marketed for bicycles and so differs from a product intended for motorcycles. A further difference lies in the feature of the second control body which is to be understood as the component

which the user touches. In both D1 and D10 the lug is the control body, not the associated ring. Indeed, the lugs prevent the rings from being gripped. Moreover, it follows from the reference to the first and second diameters that the control surfaces are circular in cross-section. In D1 there is no unambiguous disclosure of such a second control surface. As far as D10 is concerned this relates to single track vehicles and such a generic disclosure cannot anticipate the specific subject-matter of a bicycle component. Additionally, the skilled person would immediately recognise that D10 relates to a motorcycle component, for which the controls would be operated individually. The second control body of D10 can only be considered as being larger than the first control body if the latter excludes the flange adjacent the former. However, in that case the two control bodies would not be adjacent.

The feature of the 'cylindrical' second control body in claim 1 according to the first auxiliary request is derivable from figures 2, 3 and claim 6 of the application as originally filed which together disclose a right circular cylinder. The chamfer is shown in the figures only as an indicator.

As far as claim 1 according to the second auxiliary request is concerned, D10 contains no disclosure that the two control bodies are operable simultaneously. Indeed, since the lug is not shown in the longitudinal view the relative spacing of the two bodies cannot be determined. Moreover, claim 1 now requires that it is the annular member itself which is operable, not a lug

as in D10. The subject-matter of claim 1 therefore is new with respect to the disclosure of D10.

The amendment in claim 1 according to the third auxiliary request was originally disclosed because both control bodies in the figures are provided with surface decoration and both comprise a maximum diameter formed by that decoration. The maximum diameter in each case is the effective gripping diameter.

The subject-matter of claim 1 according to the fourth auxiliary request is not rendered obvious by a combination of D10 and D6. D6 forms the closest state of the art because D10 does not relate to the same technical field as the subject-matter of claim 1. D6 discloses a single sleeve which in figure 1 is connected to a brake whilst the additional control for a gear shifter in figure 3 is thumb-operated. Claim 5 of D6 is obscure and provides no clear teaching. The objective problem when starting from the disclosure of D6 is to provide for simultaneous operation of the two controls irrespective of the position of the second control body. Since D10 also discloses a combination of a sleeve and a thumb-operated control which is operable only in certain positions the combination with D6 would not result in the subject-matter of the claim.

The feature in claim 1 according to the fifth auxiliary request of the connection of the respective control bodies to shifting and brake cables finds a basis in original claim 8 as dependent from claim 6. Claim 8 disclosed only two possible connection arrangements, of which one is now claimed. The added wording "thus allowing simultaneous operation …" does not imply that

the simultaneous operation results from the difference in diameters of the two control bodies. On the contrary, this results from the combination of all of the features.

Reasons for the Decision

The present decision was taken after the revised European Patent Convention (EPC) entered into force on 13 December 2007. Since the patent was granted at that time, the board applied the transitional provisions in accordance with Article 7(1), second sentence, of the Act revising the EPC of 29 November 2000 and the Decisions of the Administrative Council of 28 June 2001 (Special edition No. 1, OJ EPO 2007, 197) and 7 December 2006 (Special edition No. 1, OJ EPO 2007, 89). Articles and Rules of the revised EPC and of the EPC valid until that time are cited in accordance with the Citation Practice (see the 13th edition of the European Patent Convention, page 4).

1. The patent relates to a coaxial arrangement of two mutually adjacent 'twist grip' controls for mounting on the end of a bicycle handlebar, whereby one control is of a larger diameter than the other.

Late-filed evidence

2. D10 *prima facie* discloses the characterising features of claim 1 more clearly than D1 and is in a technical field at least as close as D1 to the subject-matter of the present patent. According to Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA) in the amended version of 13 December 2007 (OJ EPO 2007,

536) "any amendment to a party's case after it has filed its grounds for appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy". Admittance of D10 therefore is subject to consideration of those criteria.

2.1 D10 consists of less than two full A4 pages of text and one sheet of drawings. Over two months after receiving the board's indication that it found D10 sufficiently relevant to justify admitting it into the procedure the respondent in the letter of 16 November 2007 analysed the disclosure of D10 and contested the relevance. It follows that at the oral proceedings when the board took the decision to admit D10 both the board and the respondent had had ample opportunity to assess the document. D10 is a patent document and no issues regarding matters such as establishing public availability needed to be addressed. As a result, no complex issues arise from admitting the document.

2.2 The board therefore exercises its discretion and admits D10 into the proceedings.

Main request - novelty

3. D10 relates to a 'twist grip' control device for single-track vehicles comprising two mutually adjacent coaxial rotatable grips. The first, elongated, handle grip connects to one control cable and the second, auxiliary grip connects to a second control cable. It acknowledges as earlier state of the art such control

devices in which the rotation of one grip was undesirably transferred to the other ('slaving'). The disclosure primarily relates to the internal construction of the auxiliary grip in order to prevent slaving. The handle grip comprises a gently convex external surface over most of its length with a larger diameter flange provided at the end adjacent to the auxiliary grip. The auxiliary grip has an external diameter which varies axially but always is intermediate the diameters of the convex and flange portions of the handle grip. It is provided with a single radial lug, evidently as an abutment to aid in rotating the grip. The parties disagree as regards disclosure by D10 of the following features of claim 1:

– a "bicycle" control unit for mounting at one end of a handlebar "of a bicycle"; and

– the second control body has a diameter greater than the diameter of the first control body.

3.1 It is a long established principle in the European patent system that statements of an intended use in claims are to be interpreted in such a way that the statement "for a bicycle" in present claim 1 means 'suitable for a bicycle'. This is not disputed by the respondent. Contentious in the present case, however, is the designation of the claimed subject-matter as a "bicycle control unit" which in the view of the respondent is to be considered as a restriction to control units which would be marketed for bicycles.

3.1.1 According to decision G 2/88 (OJ EPO 1990, 93, Reasons, point 7): "A claimed invention lacks novelty unless it

includes at least one essential technical feature which distinguishes it from the state of the art. When deciding on the novelty of a claim, a basic initial consideration is therefore to construe the claim in order to determine its technical features."

3.1.2 How a device is marketed is not a technical feature of the device so that, even if the wording "bicycle control unit" were to be understood in the way suggested by the respondent, it would fail to provide a distinction from a known device which is disclosed in respect of a motorcycle but which is suitable for use on a bicycle. Indeed, in some respects the distinction between the vehicles encompassed by these terms is somewhat unclear, such as in the case of a bicycle having an auxiliary motor fitted.

3.1.3 The references in claim 1 to a bicycle therefore fail to distinguish the subject-matter from a device which otherwise has the same technical features and would be suitable for use on a bicycle.

3.1.4 The control unit according to D10 is disclosed as being intended to be mounted on a handlebar of a single track vehicle. No further detail is given as regards the intended use and the amount of longitudinal movement of the cables caused by rotational movement of the respective grips is not specifically addressed. The skilled person presented with the content of D10 would see no obstacle to the use of that control unit on a bicycle. The respondent argues that the skilled person would recognise the control unit of D10 as being intended for a motorcycle but it has not named any feature which would render it unsuitable for a bicycle.

It does argue that the skilled person would appreciate that a composite control unit for a motorcycle would not be intended to permit simultaneous operation of the two control bodies. However, since that feature is not in present claim 1 the point is not relevant to the present matter.

3.2 Present claim 1 specifies that the first and second control bodies each have a respective diameter, the second being greater than the first. The intended diameters are not further specified. It can be seen from the drawings of D10 that both the first and second control bodies have varying external diameters. The first, elongated control body has a diameter, albeit varying, which over all of its length except at the flange is less than the smallest diameter of the second control body. Although this relationship is derivable only from the drawings, it is consistent with the technical teaching of D10 relating to the provision of additional features within the second control body to avoid slaving and which would necessarily enlarge the second control body. It follows that D10 discloses the literal requirement of present claim 1 that the second control body has a diameter which is greater than a diameter of the first control body. This is also the case if the respective diameters in claim 1 are understood to be the effective diameters at which effort is applied to rotate the control bodies since the effective diameter of the second control body is clearly greater than the maximum diameter defined by the convexity of the first control body. The respondent argues that the respective control bodies are limited to those portions which the user grips or acts upon and so concludes that the first control body is not

adjacent to the second because the flange separates them. However, the respondent is attempting in this way to define a particular control portion of the first control body, for which there is no basis either in the present claim or in the patent specification taken as a whole. Similarly, the lug of the D10 device cannot be considered separately from the ring portion as defining the second control body. It is evident from the disclosure of D10 to the skilled person that the outer diameter of the ring body provides a control surface which is supplemented by the lug.

3.3 On the basis of the foregoing the board finds that the subject-matter of claim 1 according to this request is not new with respect to the disclosure of D10 (Article 54(1) EPC 1973).

First auxiliary request - original disclosure

4. The subject-matter of claim 1 differs by the additional feature that the second annular member has a "cylindrical" body. The term 'cylinder' has two meanings: a strict, mathematical one and a more general one intended by the respondent, that of a right circular cylinder, i.e. a solid having two coxial circular bases of identical diameter and whose peripheral surface is generated by a straight line parallel to the axis and moving around the circumference of the bases. The respondent sees a basis for this amendment in the figures and claim 6 of the application as originally filed.

4.1 In the figures and claim 6 as originally filed the second control body is depicted as being circular with

a series of longitudinal grooves on the surface and with a chamfered corner at the end adjacent to the first control body. There is no more detailed description. The existence of both the grooves and the chamfer precludes the possibility of considering the second control body as being a right circular cylinder.

4.2 The board concludes that the amendment of claim 1 according to this request does not satisfy the requirement of Article 123(2) EPC.

Second auxiliary request - novelty

5. Claim 1 as granted has been amended according to this request by specifying the respective "outer" diameters and by defining that "the second control body is operable by a thumb and forefinger of an operator's hand while the remaining fingers of the operator's hand hold the handle grip". Neither the board nor the appellant sees any formal objection to these amendments.

5.1 The specification of "outer" diameters has no influence as regards novelty of the subject-matter of the claim because it was the outer diameters of the control bodies in D10 which were considered under point 3 as contributing to the lack of novelty of the subject-matter of claim 1 according to the main request.

5.2 D10 is silent as regards how the two control bodies may be held and operated. Nevertheless, it is implicit to the skilled person from the coaxial and adjacent arrangement of the two control bodies that the elongated grip may be held whilst the auxiliary grip is operated as presently claimed. The board notes in this

respect that, contrary to the respondent's arguments, the claim does not require that both are operable simultaneously. Moreover, it does not require that this be the only way in which they are operable. Furthermore, the lug on the second control body according to D10 does not influence consideration of the present additional features because it would not prevent the user from being able to grip the circular portion of the body. Similarly, the flange on the first control body according to D10 clearly is not sufficiently large that it would prevent a user's hand from bridging the two control bodies.

5.3 On the basis of the foregoing the board finds that the subject-matter of claim 1 also according to this request is not new with respect to the disclosure of D10 (Article 54(1) EPC 1973).

Third auxiliary request - original disclosure

6. Claim 1 according to this request has been amended to specify that the respective diameters of the two control bodies are "maximum outer" diameters. The respondent's intention with this amendment corresponds to the board's interpretation of the claim as amended, that the term "maximum" implies at least one other diameter to form a basis for the comparison. The respondent sees a basis for this amendment in the figures as originally filed, in particular in the provision of surface decoration on both control bodies.

6.1 Figures 1 and 3 as originally filed are side views in which the first control body is illustrated as being provided with a diamond pattern which is not otherwise

described. These figures are evidently schematic as the pattern is not accurately depicted at the upper and lower portions of the figure where the view of the surface would be oblique and therefore distorted in shape. The upper and lower edges of the first control body are shown by straight lines. The use of the straight lines where the indicated pattern intersects the edges of the first control body implies that the pattern creates no interruption in the surface. There was no direct and unambiguous disclosure of the diamonds being in the form of a series of surface depressions. As a result, there was a disclosure only of a single diameter for the first control body and therefore no disclosure of a "maximum" diameter within the meaning of the claim.

6.2 On the basis of the foregoing the board concludes that the amendment of claim 1 according to this request does not satisfy the requirement of Article 123(2) EPC.

Fourth auxiliary request - inventive step

7. Claim 1 according to this request has been amended by adding the features that "one of the first rotary control body and the second rotary control body is connected to a shifting cable, and the other one of the first rotary control body and the second rotary control body is connected to a brake cable". Neither the board nor the appellant sees any objection arising from this amendment. Furthermore, both the board and the appellant recognise the subject-matter of claim to be new with respect to D10 by virtue of this additional feature. It remains to consider whether the subject-matter of the claim involves an inventive step.

7.1 The board agrees with the respondent that the closest state of the art for consideration of inventive step is the disclosure of D6. D6 relates generally to the provision of a rotatable sleeve on the end of a bicycle handlebar as a control body for controlling functions such as gear shifting and braking. Two embodiments are shown, in figures 1 and 3 respectively. In the embodiment of figure 1 the rotatable sleeve is provided on a fixed member and relative rotation operates the brake cable. In the alternative embodiment of figure 3 a shifting sleeve ("Schaltmuffe") is rotatable as in figure 1 (column 1, lines 63, 64), evidently for operating the gear shift cable. In column 2, lines 8, 9 it is suggested that shifting and braking devices be integrated in a brake sleeve. The disclosure of D6 is somewhat vague and unclear as regards technical details but it nevertheless clearly conveys the idea of providing both braking and gear shifting devices in a single unit on the end of the handlebar of a bicycle. It does not, however, provide a workable teaching as to how this might be put into effect. In the light of D6 the technical problem solved by the subject-matter of present claim 1 therefore is seen as to provide a workable implementation of the teaching of D6.

7.2 The skilled person wishing to solve the set problem would become aware of D10 since it is from the same, albeit somewhat broader, technical area. It provides a clear, workable teaching as to the construction of a coaxial control unit but is silent as regards which functions it may perform. It would readily occur to the skilled person that it could be used for the functions suggested in D6 and he would require no inventive

ability to combine the teachings. In so doing he would arrive at the subject-matter of present claim 1.

7.3 The respondent takes the view that the objective problem solved by the subject-matter of present claim 1 when starting from D6 is to provide for simultaneous operation of the two controls irrespective of the position of the second control body. It concludes that D6 and D10 are not relevant to the claimed solution since they restrict themselves to the provision of a thumb switch in an essentially fixed position for the gear shifter. However, the subject-matter of the claim does not exclude the presence of a lug on the second control body and so does not positively provide for operation at any rotary position. Moreover, it does not require that the two control bodies be operated simultaneously.

7.4 On the basis of the foregoing the board finds that the subject-matter of claim 1 according to this request does not involve an inventive step (Article 56 EPC 1973).

Fifth auxiliary request - original disclosure

8. Claim 1 according to this request includes two essentially mutually independent amendments:

- the addition of the wording "thus allowing simultaneous operation of the first rotary control body and the second rotary control body"; and

- the addition of the feature that the first rotary control body is connected to a shifting cable, and

the second rotary control body is connected to a brake cable.

8.1 The first amendment, relating to simultaneous operation, has been made to the part of the claim defining the feature relating to the different diameters, thereby introducing a causal relationship between that feature and the simultaneous operation. No such relationship was originally disclosed, however. According to column 1, lines 23 to 28 of the application as published the mutually spaced mountings of brake and shifter control units in the prior art meant that the user's hand had to be removed from one control to operate the other. On the other hand, according to column 1, lines 37 to 40 it was the common location of the control bodies which made it "easy to operate both … at the same time". The feature of differing diameters was said to allow easier distinction between the controls and matching of the mechanical advantage to the function (column 2, lines 5 to 9). It follows that the causal relationship presently defined in the claim was not disclosed in the original application. The board cannot accept the respondent's argument that the claim defines the causal relationship as being with the combination of all features since that contradicts the way in which the claim is formulated.

8.2 As regards the second amendment, in both embodiments of the unit as originally disclosed the second control body was connected to the gear shifter. This is derivable from the gear index numbers shown on the respective second control bodies. However, that arrangement is the opposite of that presently claimed and so provides no basis for the amendment. The only

other original disclosure of the allocation of functions to the respective control bodies was in claim 8 which specified that one control body was connected to the brake and the other to the gear shifter. It is this disclosure which the respondent sees as a basis for the arrangement presently claimed. However, present claim 1 goes beyond merely assigning the braking function to one of the control bodies. It specifies control bodies of different diameters, that the smaller one forms the elongated hand grip and that the larger one operates the brake. In order to arrive at this combination of features original claim 8 must be read in combination with original claims 5 and 6. However, claim 5 merely specified that at least one of the control bodies was elongated and formed a hand grip whilst claim 6 added that either one of the control bodies may have a larger diameter than the other. It follows that the particular combination of features presently claimed results from an arbitrary selection from a series of alternatives. Such a selection cannot be considered as being directly and unambiguously disclosed, particularly when the result is contrary to the only arrangement described in detail.

8.3 On the basis of the foregoing the board finds that the amendments made to claim 1 according to this request do not satisfy the requirement of Article 123(2) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

A. Vottner S. Crane